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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. ERLBAUM,
a New York City Criminal Court Judge,

Petitioner,

—v.—

ROBERT M. MORGENTHAU,
New York County District Attorney,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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CRIMINAL COURT JUDGE WILLIAM M. ERLBAUM RESPECTFULLY PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT IN THIS CASE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.

QUESTION PRESENTED

1. Whether the New York Court of Appeals' adoption of an inflexible dividing line--a maximum authorized sentence of more than six months--as the sole criterion for triggering the right to a jury trial, denies Sixth Amendment rights to a woman accused of prostitution who faces a three-month maximum sentence.

OPINIONS BELOW

The opinion of the New York Court of Appeals (App. at 1a-25a) is not yet reported. That opinion affirmed two lower court rulings that the defendants, who were accused of prostitution, were not entitled to a jury trial. The opinion of the Appellate Division (App. at 26a-27a) summarily affirmed the opinion of a Special Term, Part I, of the Supreme

Court (App. at 28a-43a) which is reported in Morgenthau v. Erlbaum, 445 N.Y.S.2d 997 (Spec. Term. N.Y. Cty. 1981).

The petitioner in this case is a New York City Criminal Court Judge William M. Erlbaum.[1] The opinion in petitioner's court

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1 Petitioner Erlbaum's standing to pursue this issue before the Court, though anomalous for a judge, is established by the New York Court of Appeals' decision below. (App. at 19a-20a) That ruling held that a declaratory judgment proceeding under Civil Practice Law and Rules § 3001 was the procedural mechanism available to the respondent district attorney to challenge Judge Erlbaum's ruling in the Criminal Court. Thus, Judge Erlbaum's order granting the defendants a jury trial is directly in issue.

In fact, by dismissing the criminal defendants as outside the scope of the declaratory judgment, the Court of Appeals found that petitioner Erlbaum is the only party to the controversy against whom the declaratory judgment operates. (App. at 18a, 24a) Under New York law a declaratory judgment is the equivalent of any other final judgment with full res judicata and collateral estoppel effects. In this case, declaratory judgment is also the only substitute for the original writ of prohibition which the respondent sought. (App. at 4a-20a) Thus, enforcement against Judge Erlbaum could include the full range of judicial mechanisms, none of which would be available had petitioner's original order been merely appealable. See Weinstein, Korn and Miller, New York Practice § 3000.20(g) (1982).

(fn. cont. on next page)

is reported in People v. Link, 436 N.Y.S.2d 581 (Cr. Ct. 1981). It holds that the Sixth Amendment guarantees a jury trial in the case of an accusation of prostitution which, notwithstanding a maximum sentence of less than six months, is a "serious" offense under "objective criteria, chiefly the existing laws and practices in the Nation." (quoting from Duncan v. Louisiana, 391 U.S. 145, 176 (1968) (App. 67a, at fn. 54.)

(fn. cont. from preceding page)

Moreover, petitioner's order to grant the criminal defendants a jury trial was originally attacked by respondent by means of an extraordinary writ under New York Civil Practice Law and Rules Article 78. Conversion to a declaratory judgment was in form only. Thus, this case proceeded in much the same manner as many that have been decided by this Court under its authority to review extraordinary writs issued against district courts. See, e.g., Beacon Theatres v. Westover, 359 U.S. 500, 511 (1959) (reviewing mandamus denial seeking a jury trial); See also, Stern and Gressman, Supreme Court Practice, "Extraordinary Writs," p. 634-35 (1976).

JURISDICTION

The judgment of the New York Court of Appeals was decided on June 7, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. 1257(3)

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

STATEMENT OF THE CASE

Carol Link and Debra Meltsner were charged with prostitution[2] which, in New York, is a misdemeanor carrying a maximum sentence of three months.[3] Neither had been arrested or

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2 These defendants were charged pursuant to New York Penal Law §230.00 which states: "A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person for a fee."

3 New York Penal Law §70.15(2).

convicted for prostitution previously and both pleaded not guilty.

When they appeared before petitioner, Criminal Court Judge William M. Erlbaum, they moved for a jury trial contending that New York's Criminal Procedure Law (hereafter "C.P.L.") §340.40(2) violated the Sixth Amendment insofar as it precluded a jury trial in their cases.

C.P.L. §340.40(2) regulates the right to trial by jury in New York in misdemeanor cases. That section, in pertinent part, directs that:

> In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial, conducted pursuant to article three hundred sixty, except that in the New York city criminal court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial....

In response to the defendants' motion, for a jury trial, petitioner found that

prostitution is a "serious" rather than "petty" offense which, notwithstanding the authorized maximum penalty, triggers the right to a jury trial under the case law of this Court interpreting the scope of the Sixth Amendment's jury trial guarantee. (App. at 49a-52a) See Point I.

Judge Erlbaum based his decision on the prevailing practice in 43 states, including New York,[4] each of which guarantees jury trials for persons accused of prostitution. Moreover, Judge Erlbaum reviewed historical and current criteria concerning the objective seriousness of the offense of prostitution, concluding that for society, as well as for the person accused of prostitution, the consequences of a conviction on such a charge are so objectively

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4 Pursuant to C.P.L. §340.40(2) all persons accused of misdemeanors outside the city limits of New York City are entitled to jury trials.

devastating that the crime must be considered serious enough to warrant a jury trial.[5]

(App. at 53a-68a)

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[5] The equal protection issue raised by C.P.L. §340.40(2) which precludes jury trials for defendants accused of certain misdemeanors including prostitution within the city limits of New York, but guarantees jury trials to similar defendants elsewhere in the state, was not reached by Judge Erlbaum in his opinion. (App. at 68a) This issue has not been raised on appeal or in this petition, as petitioner believes that the jury trial right in this case is dependent upon the scope of the Sixth Amendment, not the guarantee of equal protection. If outside the Sixth Amendment's protection, then administrative needs might well justify the disparity of treatment inherent in CPL §340.40(2). If within the scope of the Sixth Amendment, the jury trial right is, in any event guaranteed. See Duncan v. Louisiana, 391 U.S. 145, 160 (1968):

> [T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

With no available interlocutory appeal of petitioner Erlbaum's ruling,[6] District Attorney Robert M. Morgenthau, respondent herein, sought review of the decision in Special Term of the Supreme Court pursuant to a writ of prohibition,[7] which was subsequently converted to the instant declaratory judgment action.[8] (App. at 33a)

In this separate proceeding the District Attorney's office argued that a fixed dividing line--a six-month maximum authorized sentence--is the sole factor determinative of the Sixth Amendment's jury trial right. According to this view, all crimes with authorized sentences of six months or less are "petty" and do not trigger the right to a jury trial; whereas,

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6 See, CPL § 450.20.

7 Article 78 of the Civil Practice Law and Rules (hereafter CPLR).

8 See, CPLR §§3001 and 103(c).

only defendants accused of crimes with potential sentences of more than six months are accorded the right to a jury trial. The District Attorney thus argued that the Sixth Amendment's jury trial guarantee is solely dependent on the State legislature's classifications of crimes, as manifested by the statutorily authorized penalties.

The Special Term of the State Supreme Court accepted this argument, issuing a declaratory judgment against Judge Erlbaum and the defendants Link and Meltsner to the effect that C.P.L. §340.40(2) was constitutional. (App. at 41a-42a) By summary affirmance the Appellate Division, First Department agreed with the Special Term. (App. at 26a-27a).

The Court of Appeals affirmed, ruling in its opinion that the maximum sentence authorized by the State legislature is the sole factor which determines whether a crime is serious or petty under the Sixth Amendment.

(App. at 20a-25a) The court adopted a fixed dividing line of a six month maximum sentence, deferring without qualification to the legislature's sentencing scheme. Thus, the Court of Appeals foreclosed consideration of the question of whether prostitution, or any other crime with a maximum sentence of six months or less, can ever be considered "serious" under the Sixth Amendment jury trial guarantee.

REASON FOR GRANTING THE WRIT

The New York Court of Appeals' decision should be reviewed because it relied entirely and improperly upon dictum in Codispoti v. Pennsylvania, 418 U.S. 506 (1974), which states:

> [O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes. 418 U.S. at 511-512.

As illustrated by the decision below, that statement, by a plurality of this Court, has spawned confusion over the jury trial right in criminal cases with maximum authorized sentences of six months or less. Notwithstanding the unequivocal import of the dictum in Codispoti, its context reveals that this statement does not purport to overrule almost a century of this Court's precedent which was summed up six years earlier, in Duncan v.

Louisiana:

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. 391 U.S. at 160.

The ambiguity in the Court's view on this subject has spawned a conflict among the state and lower federal courts on whether the Sixth Amendment can ever require a jury trial in the case of a person accused of a crime for which the maximum authorized penalty is six months or less. See, e.g., United States v. Craner, 652 F.2d 23 (9th Cir. 1981); United States v. Woods, 450 F. Supp., 1335 (D. Md. 1978). See Point II, below. Though Duncan v. Louisiana, 391 U.S. 145 (1968) and Baldwin v. New York, 399 U.S. 66 (1970)

reiterated the traditional rule that the maximum authorized sentence is one, albeit the most important factor, in triggering the Sixth Amendment's jury trial guarantee, the dictum in Codispoti, has clouded this doctrine.

The instant case is one of many in which courts have erroneously fixed exclusively on the Codispoti statement, barring all consideration of the "objective criteria, chiefly the existing laws and practices in the Nation," Duncan v. Louisiana, 391 U.S. at 161, in evaluating whether conviction for a crime carrying a maximum sentence of less than six months could ever warrant a jury trial. See Point II. Like these other courts, the New York Court below, focused only upon the legislatively determined maximum sentence of three months in summarily dismissing petitioner's ruling. Notably, the Court of Appeals ignored the fact that 43 states guarantee jury trials for persons accused of prostitution as well as

the evidence that a conviction for prostitution has special serious consequences for society and the defendant.

Furthermore, in seizing upon the above quoted statement from Codispoti, the Court of Appeals ignored the disclaiming footnote in Codispoti which prominently concedes that a majority of this Court has never indicated agreement with the "fixed dividing line" dictum.[9]

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[9] Footnote 4 in the Codispoti majority opinion states:

> "In tracing the lineage of the six-month dividing line for purposes of ascertaining whether a jury trial is required under the Sixth Amendment, Mr. Justice Rehnquist's dissent implicitly questions the authenticity of this rule. Putting aside whether the 'constitutional rule of Bloom' ever 'evolved' into the present rule, it is sufficient to note that although only three Members of the Court explicitly embraced the six-month demarcation point in Baldwin v. New York, 399 U.S. 66 (1970), Mr. Justice Black and Mr. Justice Douglas concurred in the judgment. While reading the Sixth Amendment to require a jury trial for "all crimes," they expressed the view that imprisonment for more than six months would certainly necessitate a jury trial.

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Thus, the opinion in the Court of Appeals represents a significant misapprehension of the import of the Court's precedent. As recently as the close of last term, the Court stated in a related case:

> In short, Baldwin clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the

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> Five Members of the Court out of the eight participating therefore agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months." 418 U.S. at 512;

See also United States v. Woods, 450 F. Supp. 1335, 1341 (D. Md., 1978) for a complete analysis of the import of Justice White's dictum in Codispoti, concluding that the statement was limited to the crime of criminal contempt at issue in Codispoti. Notably, Justice Douglas concurs with Justice White in Codispoti even though in Baldwin it is clear that Justice Douglas would guarantee a jury in every criminal case. 399 U.S. at 74-76. Thus, at least Justice Douglas could not have taken the Codispoti dictum as precluding a jury trial for all crimes drawing six months or less.

> practices in other jurisdictions in deciding where lines between sentences should be drawn. Solem v. Helm, ___U.S. ___51 U.S.L.W. 5019, 5024, June 28, 1983.

For the sake of clarifying this confusion in the lower courts, the Court should settle once and for all that there exist instances when a jury trial must be provided in cases of certain serious crimes with maximum sentences of six months or less.

I.

THE COURT SHOULD GRANT CERTIORARI TO REAFFIRM THAT CERTAIN CRIMES, SUCH AS PROSTITUTION, TRIGGER THE RIGHT TO A JURY TRIAL NOTWITHSTANDING A MAXIMUM SENTENCE OF SIX MONTHS OR LESS. THE COURT'S DICTUM TO THE CONTRARY IN CODISPOTI V. PENNSYLVANIA SHOULD BE CLARIFIED.

In Codispoti v. Pennsylvania the Court stated that:

> [O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes, 418 U.S. at 511-512.

This dictum characterizing the distinction between "petty" and "serious" offenses as defined by a fixed dividing line of a six month maximum sentence for purposes of determining whether a jury trial will be provided, represents a marked departure from a century of the Court's precedent. Nonetheless, neither in Codispoti nor thereafter has the Court indicated that it has altered the

traditional rule assuring the right to a jury for the trial of all "serious" offenses, no matter how short the maximum sentence. Thus, substantial confusion exists as to the jury trial right with respect to crimes carrying a maximum sentence of six months or less. This confusion has led several courts, including the Court of Appeals below, to abandon this Court's traditional rule in favor of the bright-line test which Codispoti announced. See Point II.

The origins of the traditional rule are instructive with regard to the confused present posture of this aspect of the jury trial right. The development of the right demonstrates that its formulation over the last century has been largely dependent on the maximum sentence when the maximum exceeds six months; however, when set at less than six months, the maximum term has been only one indication of whether a crime is, nonetheless, classified as "serious" for Sixth Amendment purposes.

A. The Traditional Rule

Taken literally, the Sixth Amendment does not admit of any exception to the right to trial by jury. However, in a series of cases beginning with Callan v. Wilson, 127 U.S. 540 (1888), the Court determined that the denial of a jury trial for certain offenses--those that are characterized as "petty"--does not violate the Sixth Amendment.

In the course of this development, a clear and simple structure emerged for discerning whether an offense was petty for the purposes of the Sixth Amendment. The Court first inquired whether the offense was in and of itself of a serious nature.[10] If it was

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10 The analysis of the first question, whether the offense was serious by its nature, turned on three considerations: (1) whether the crime was indictable at common law; (2) whether the offense was malum in se; and (3) whether the offense involved moral delinquency or turpiture. Crimes indictable at common law were regarded as serious, despite the insignificance of

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not, the Court then considered whether the sentence imposed was sufficiently lengthy to remove the offense from the category of what would otherwise be a petty crime.

A more recent series of cases involving criminal contempt charges has reaffirmed the Court's traditional approach. In these cases

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the penalty attached. See Callan v. Wilson, 127 U.S. 540, 555-557 (1888). Crimes mala in se were similarly deemed serious despite the insignificance of the sentence attached. See District of Columbia v. Colts, 282 U.S. 63, 73-74 (1930); Schick v. United States, 195 U.S. 65, 67 (1904); Natal v. Louisiana, 139 U.S. 621, 624 (1891). And crimes assessed for their moral delinquency were analyzed on an ad hoc basis. See District of Columbia v. Clawans, 300 U.S. 617, 625 (1937); Schick v. United States, 195 U.S. 65, 67 (1904). In Schick the Court stated:

> The truth is the nature of the offense, and the amount of punishment prescribed... determine whether it is to be classed among serious or petty offenses--whether among crimes or misdemeanors. 195 U.S. at 68.

the Court carefully evaluated the intrinsic qualities of the offense of criminal contempt in determining the alleged contemnor's right to trial by jury. The result of this analysis is that the Court has determined that "the nature of criminal contempt, an offense sui generis, does not, by itself, warrant [trial by jury]," Cheff v. Schnackenberg, 384 U.S. 373 (1966), and "criminal contempt is a petty offense unless the punishment makes it a serious one." Bloom v. Illinois, 391 U.S. 194, 197 (1968).

While these cases establish that a maximum sentence exceeding six months guarantees a right to trial by jury, Bloom v. Illinois, 391 U.S. at 210-211; Frank v. United States, 395 U.S. 147, 148 (1968); Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974), the contempt cases have not addressed whether a lesser penalty in the case of other offenses should bar the courts from treating a morally objectionable

offense, such as prostitution, as serious and, therefore, deserving of the right to trial by jury.

That issue was addressed in District of Columbia v. Colts, 282 U.S. 83 (1930). The defendant in Colts was charged with reckless driving, an offense punishable by a fine of only $25 to $100 and imprisonment ranging from ten to thirty days. Id. at 71-72. Despite the modesty of these penalties, the Court refused to characterize the offense of reckless driving as petty; it declared the offense to be "a crime within the meaning of the third article of the Constitution--and as such within the constitutional guaranty of trial by jury." Id. at 74. A concrete assessment of the offense's intrinsic qualities formed the basis of the Court's

decision:

> An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets...so recklessly "as to endanger property and individuals" is an act of such obvious depravity that to characterize it as a petty offense would be to shock the moral sense. 282 U.S. at 73.

B. The Current Status of the Rule.

In marked contrast to the bright-line test based on the maximum sentence set forth in the Codispoti dictum, six years earlier, the Court in Duncan v. Louisiana, 391 U.S. 145 (1968) acknowledged the inappropriateness of deferring to lines drawn by legislative enactment in evaluating the seriousness of a crime. Rather, the Court recognized the judiciary's ultimate responsibility to decide whether an offense is sufficiently serious to invoke

the constitutional guarantee of a jury trial.

The Court in Duncan wrote:

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. (emphasis added) 391 U.S at 160.

See also, Baldwin v. New York, 399 U.S. 66, 68 (1970).

Undoubtedly, the Codispoti dictum has cast a cloud over the Duncan approach. See Point II, infra. However, the footnote to the Codispoti statement, acknowledging the lack of majority backing for a bright-line test, quoted ante at pp. 14-15, remains

substantial support for the traditional rule.[11]

Notably, as recently as last term the Court reaffirmed this approach without

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11 Similarly, the inferences from significant statements in three cases decided with and after Codispoti, display continued support for the Court's traditional rule. In Taylor v. Hayes, 418 U.S. 488 (1974), decided the same day as Codispoti, the Court evaluated criminal contempt once again and stated that it "'is not a crime of the sort that requires the right to jury trial regardless of the penalty involved.'" 418 U.S. at 496 citing Bloom v. Illinois, 391 U.S. 194, 211 (1968) (emphasis added). Subsequently, in Muniz v. Hoffman, 422 U.S. 454 (1975) the Court referred to criminal contempt as "in and of itself and without regard to the punishment imposed" not a "serious" offense. 422 U.S. at 476. And, finally, in Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Court noted that a petty offense is "usually defined by reference to the maximum punishment that might be imposed." 427 U.S. at 624-25 (emphasis added).

mentioning Codispoti. In Solem v. Helm, ___ U.S.___, 51 U.S.L.W. 5019 (June 28, 1983), the Court held that the evaluation of punishment under the Eighth Amendment is a judicial function, not requiring deference to legislative judgments. In so doing, the majority relied on Duncan and Baldwin's Sixth Amendment analysis as described above:

> In short, Baldwin clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn. Solem v. Helm, ___U.S.___, June 28, 1983, 51 L.W. 5019, 5024.

In the instant case, the opinion of the Court of Appeals declined to engage in the evaluative function assigned to it by this Court. Instead, it woodenly applied the literal interpretation of the Codispoti dictum in settling upon the six month bright-line test. This application of the rule precludes

judicial assessment of seriousness based upon the grave social, moral, economic, and collateral legal consequences of the specific conviction at issue.

Judge Erlbaum's opinion in the Criminal Court conclusively demonstrates that the crime of prostitution satisfies the criteria of a serious offense. People v. Link, supra (App. at 49a-67a) In evaluating prostitution, the petitioner followed the dictates of this Court, assessing the "objective indications of the seriousness with which society regards the offense." Frank v. United States, 395 U.S. 147, 148 (1969) as well as the "objective criteria, chiefly the existing laws and practices in the Nation." Duncan v. Louisiana, 391 U.S. at 161.

C. Prostitution Is a Serious Offense.

The incidence of prostitution has inspired virtually every form of criminal sanction known to man. Historically, prostitutes were stoned. More recently, prostitution has engendered shrill outcries from New York community groups for severe penalties, and the respondent has called for mandatory imprisonment for prostitution.[12]

Currently, federal laws provide for the exclusion and deportation of alien prostitutes, and prohibit trade in prostitution.[13] State laws prohibiting all facets of the prostitution trade have proliferated since the turn of the century. Twenty-five states impose penalties for the act of prostitution of nine months or more, and of the remaining

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12 See proposed New York State Assembly Bill #4476.

13 See 8 U.S.C. §1182(a)(12) and 1251(a)(12) (1976); 18 U.S.C. § 2421 (1976).

25 that do not, 17 guarantee a jury trial to persons accused of prostitution. Thus, 43 states, including New York, outside of New York City, guarantee jury trials for the crime of prostitution.[14]

Furthermore, the prostitute may lose custody of her children, visitation rights,

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[14] Petitioner in People v. Link, supra (App. at 68a-69a) demonstrates that even outside of New York City, where persons accused of prostitution are entitled to jury trials, defendants simply do not often demand juries. Thus, the fear that New York City's Criminal Court will be overwhelmed with jury demands has no basis in fact.

Furthermore, there is every reason to believe that few jury demands will be made except by women, such as the defendants in the instant case, who have never been accused of prostitution previously. Professional prostitutes who are regularly arrested for this offense, as the statistics cited in the Link opinion demonstrate, simply plead guilty.

On the other hand, innocent persons accused of prostitution desperately need the benefit of the constitutional "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge...." Duncan v. Louisiana, 391 U.S. at 156. Those falsely accused must rely upon every legal protection to distinguish themselves from the thousands of women who are routinely processed through New York City's Criminal Court.

and the right to adopt children.[15] Prostitutes are stigmatized, branded, and deemed presumptive carriers of venereal disease by virtue of their legal status. Prostitutes are swept off the streets in police dragnets, blamed as the cause of declining tourist trade, associated with increases in crime and narcotics, exploited by pimps, victimized by customers and more often than with any other offense, introduced into a life of crime that culminates with far more serious offenses.[16]

These consequences and more are the

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15 See e.g., State In Interest of C. v. Platte County, 638 P. 2d 165 (Wyo. 1981); R. v. F., 113 N.J. Super. 396, 409-10 (1971), Petition of Berkowitz, 232 N.E.2d 72 (1967).

16 See, Milman, "New Rules for the Oldest Profession: Should We Change Our Prostitution Laws?" 3 Harvard Women's Law Journal 1 p. 1 (Spring, 1980).

aspects of prostitution that set it apart from other misdemeanors, branding the crime with a scarlet letter. If ever the accused need the protection of a jury, it is in the case of women, such as the defendants here, who are accused of prostitution for the first time.

The Court of Appeals, however, failed to reach this level in considering the issue before it, opting for a bright-line solution to the issue of when a jury trial is available. Because that issue is in a state of confusion in the aftermath of Codispoti, and because review of the unavailability of a jury trial for a person accused of prostitution is appropriate, petitioner believes that this Court should grant a writ of certiorari.

II.

THE CODISPOTI DICTUM HAS CAUSED THE NINTH AND TENTH CIRCUITS AS WELL AS OTHER COURTS TO DIVIDE ON THE ISSUE OF WHETHER A JURY IS GUARANTEED FOR CERTAIN CRIMES PUNISHABLE BY A MAXIMUM TERM OF SIX MONTHS OR LESS.

Despite substantial support for the vitality of the traditional rule concerning the right to a jury trial in cases of crimes drawing six months or less, several courts have adopted differing views of the current state of the law after the Codispoti dictum. In fact, the Tenth Circuit, after reviewing the more recent applicable precedent, invited review by this Court, in the situation of a jury trial denied to a defendant facing two concurrently imposed six month sentences:

> [W]e conclude that an expansion of the definition of a "serious offense" is a matter better left to the Supreme Court. Furthermore, given the absence of Supreme Court guidance on this issue, we prefer the interpretation that more narrowly confines...[the jury trial right]. Haar v. Hanrahan, 708 F.2d 1547, 1553 (10th Cir. 1983).

So strong is the Tenth Circuit's view in support of the bright-line rule, that not even consecutive six month maximum sentences will trigger the jury trial right if the actual sentence imposed is six months or less. Haar v. Hanrahan, supra; See also United States v. Smyer, 596 F.2d 939, 942 (10th Cir. 1979); cert. den. 444 U.S. 843 (1979).

The Nebraska Supreme Court, as well, has narrowly circumscribed the jury trial right, precluding it for all crimes punishable by six months or less. In so doing the Nebraska court, like the New York courts in the instant case, relied specifically on the Codispoti dictum, ignoring the critical footnote as well as later case law from this Court. State v. Young, 194 Neb. 544, 234 N.W. 2d 196, 197 (Neb. 1975). And, the Second District Court of Appeals in Florida has agreed. Its view, based upon Baldwin after

Codispoti, is that the bright-line rule admits of no exception. City of Tampa v. Ippolito, 360 So 2d 1316 (2nd Dis. Fla. 1978).

Similarly, Pennsylvania, New Jersey, and now New York, in the instant case, have adopted the six month bright-line. Pennsylvania has done so specifically on the basis of the Codispoti dictum for all crimes drawing six months or less. Commonwealth v. Mayberry, 327 A. 2d 86 (Pa. Sup. Ct. 1974). And, New Jersey has adhered to an absolute dividing line of six months beginning even before Codispoti. State v. Owens, 54 N.J. 153, 254 A. 2d 97 (N.J. Sup. Ct. 1969); State v. Tenriero, 183 N.J. Super. 519, 444 A. 2d 623 (N.J. Super. 1981).

Finally, in Justiniano Matos v. Gaspar Rodriguez, 440 F. Supp. 673 (1976) a district court in Puerto Rico characterized District of Columbia v. Colts, supra as overruled by

Baldwin. That Court asserts that a bright-line test of a maximum sentence of six months has been settled by this Court.

In stark contrast to the Tenth Circuit and these other courts, the Ninth and Sixth Circuits, and at least three district courts, have taken a position in favor of evaluating the "objective criteria" before declaring "petty" a crime which has a maximum sentence of six months or less.

In United States v. Craner, 652 F.2d 23 (9th Cir. 1981) driving under the influence of alcohol in a National Park, which is punishable by up to six months or a $500 fine, was found to require a jury trial under the Sixth Amendment. In reaching this decision the Court carefully analyzed the background of the jury trial right, as well as the specific import of Baldwin and Codispoti. The court found that the Sixth Amendment cannot be

defined by the legislatively set maximum sentence alone. "Otherwise, the constitutional right to a jury trial would exist only at the sufference of the legislative branch." 652 F.2d at 25. Moreover, the court found District of Columbia v. Colts, supra, to remain good law in light of numerous opportunities for this Court to overrule it. The Ninth Circuit concluded:

> To gauge the seriousness of an offense, the Supreme Court has in recent years looked to the authorized penalty and to the "relevant rules and practices followed by the federal and state regimes." 652 F.2d at 26, citing Muniz v. Hoffman, 422 U.S. at 476. (emphasis in original)

See also United States v. Sanchez-Mesa, 547 F. 2d 461, 463 (9th Cir. 1976). ("Baldwin did not hold that the maximum potential sentence was the sole criterion by which to determine whether an offense was petty....")

The Sixth Circuit, as well, has engaged in an analysis of the seriousness of an offense that proceeds beyond evaluation of a

maximum sentence of six months or less. In United States v. Stewart, 568 F.2d 501 (6th Cir. 1978) an assault drawing a maximum sentence of six months was found to be petty based upon a careful analysis of the underlying act, the culpability required and a reading of Blackstone's Commentaries on the historical underpinnings of the offense.

In three district court cases this same approach was followed to provide jury trials to persons accused of driving while intoxicated and to deny a jury in an assault case. United States v. Woods, 450 F.Supp. 1335 (D. Md. 1978); United States v. Newberne, 427 F. Supp. 361 (E.D. Ke. 1977); Brady v. Blair, 427 F. Supp. 5 (S.D. Oh. 1976). In United States v. Woods, supra at 1340-41, the court specifically analyzed the Codispoti dictum characterizing Justice White's language as limited to the crime of criminal contempt which was at issue in that case. The court,

in support of this view, cited to the Codispoti footnote, quoted above at pp. 14-15, as well as to Taylor v. Hayes, supra, which was decided the same day as Codispoti and also authored by Justice White. The Court went on to analyze drunk driving, concluding, as did this Court in Colts, that it is a serious offense.

In sum, there remains substantial confusion as to the meaning of Duncan and Baldwin in light of the Codispoti dictum. It would seem that courts are divided and that a trend will be set towards an erroneous interpretation of these cases by the New York Court of Appeals in the instant case.

Adoption, virtually without discussion by the New York Court, of the bright-line test is not the proper way in which courts should cede blanket deference to legislative judgments on Sixth Amendment rights. What if the

New York legislature set a manslaughter sentence at six months? Could a jury trial right be denied an accused? Should not the fact that 43 states guarantee persons accused of prostitution the right to a jury trial have been considered under this Court's precatory language requiring assessment of "objective criteria, chiefly the practices throughout the nation?" And should a woman accused of the offense of prostitution for the first time, be denied a paramount due process right, just because New York City must serve a perceived, but unsubstantiated, administrative need? Petitioner believes that only a grant of certiorari by this Court can settle such important questions.

CONCLUSION

For the reasons expressed herein, petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

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Dated: New York, New York
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APPENDIX

APPENDIX

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STATE OF NEW YORK
COURT OF APPEALS

OPINION

1 No. 206

In the Matter of Robert M. Morgenthau, Dixtrict Attorney of New York County, &c.,

Respondent,

v.

William M. Erlbaum, a Judge of the Criminal Court of the City of New York, New York County, et al.,

Appellants.

COOKE, Ch. J.:

On rare occasions, a criminal court will make an interlocutory ruling in favor of a defendant that will both affect fundamental rights and have implications reaching far beyond the immediate case in which the order is made. In such situations and when the controversy is purely a legal one, an independent action for declaratory relief against the ruling judge may be allowed where the circumstances warrant.

Respondent William M. Erlbaum is a Judge of the Criminal Court of the City of New York,

New York County. In 1981, two women accused of prostitution, which carries a three-month maximum sentence, appeared before Judge Erlbaum and moved for trial by jury. The defendants argued that CPL 340.40 (subd 2), directing that crimes punishable by not more than six months' incarceration shall be heard before a judge, was unconstitutional because it deprived them of their Sixth Amendment right to jury trial and denied them equal protection of the law. The court granted their motion, reasoning that, notwithstanding its relatively minor sentence, prostitution is a "serious" crime with a concomitant right to trial by jury (see People v. Link, 107 Misc 2d 973). The defendants' equal-protection argument was not reached (see id. at p. 980).

Petitioner, the District Attorney of New York County, commenced this proceeding to prevent respondent's order from taking effect. Initially, the matter was instituted under

article 78 of the CPLR to obtain a writ of prohibition. Petitioner moved to convert the proceeding into an action for declaratory judgment after this court stated that prohibition is not available to attack a criminal court's ruling that a statute denying a trial by jury is unconstitutional (see Matter of Gold v. Gartenstein, 54 NY2d 627). Special Term granted the motion to convert and declared that CPL 340.40 (subd. 2) is constitutional. The Appellate Division, First Department, affirmed, but without opinion.

Two issues are presented on this appeal. The first is the procedural propriety of an action seeking declaratory relief that, in effect, collaterally attacks a criminal court's ruling. The other matter, assuming that the action is proper, is whether CPL 340.40 (subd. 2) violates the Sixth

Amendment.[1]

In determining whether an action for declaratory judgment lies in the present circumstances, it is helpful to distinguish the action from the extraordinary remedy of prohibition, and to examine the policies underlying the decisions limiting the issuance of writs of prohibition.

A writ of prohibition may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity "'without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction'" (Matter of Dondi v. Jones, supra). The decision to issue the writ is left to the court's sound discretion, which is to be exercised after

[1]The parties do not present the equal-protection issue and, therefore, this court does not express any opinion on its merits.

consideration of various factors (see id.; La Rocca v. Lane, supra). In light of the reluctance to interfere with the normal, orderly administration of justice, an important factor is the adequacy of other legal remedies to correct the asserted error (see Matter of Dondi v. Jones, supra; La Rocca v. Lane, supra); if there is an adequate "ordinary" remedy, then there is no need to invoke an extraordinary remedy.

With reference to declaratory relief, it should first be noted that it is not an extraordinary remedy (see 1 Anderson, Actions for Declaratory Judgments [2d ed], §197, p. 408, Borchard, Declaratory Judgments [2d ed], pp 360-361; cf. Borchard, Declaratory Judgments, 1939, 9 Brooklyn L Rev 1, 4, 14; Breese; Atrocities of Declaratory Judgments Law, 41 Minn L Rev 575, 579, 595; compare CPLR 3001 with CPLR 7801). Instead, a declaratory judgment "is a remedy sui generis and escapes

both the substantive objections and procedural limitations of special writs and extraordinary remedies" (Borchard, Declaratory Judgments, 1939, 9 Brooklyn L Rev at p. 14, supra). Unlike prohibition, its use is not limited to reviewing public acts of a judicial nature. Rather, it has broad application, being invoked to declare rights derived from both private and public law (see id. at p. 9 and fnn 21-29), and from both civil (see, e.g., Quaker Oats Co. v. City of New York 295 NY 527) and criminal statutes (see e.g., Fenster v. Leary, 20 NY2d 309). Critically, declaratory judgment does not entail coercive relief, but only provides a declaration of rights between parties that, it is hoped, will forestall later litigation (see New York Public Interest Group v. Carey, 42 NY2d 527, 530-531; Borchard, Declaratory Judgments, 1939, 9 Brooklyn L Rev at p. 4, supra; Note, Developments In the Law--Declaratory Judgments--1941-1949, 61 Harv L Rev 787, 787-790; Note, The Effect of

Availability of Coercive Relief Upon the Declaratory Judgment, 8 Brooklyn L Rev 321). In other words, the declaration in the judgment itself cannot be executed upon so as to compel a party to perform an act or to surrender property.

As with prohibition, granting declaratory judgment is left to the court's discretion (CPLR 3001). In keeping with the remedy's non-extraordinary nature, however, the court has a broader power to grant declaratory judgment than it does with prohibition. It may decline to hear the matter if there are other adequate remedies available, and it must dismiss the action if there is already pending between the parties another action in which all the issues can be determined (see Woollard v. Schaffer Stores Co., 272 NY 304, 311). The mere existence of other adequate remedies, however, does not require dismissal: "We have never gone so far as to hold that, when there

exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by [the predecessor statutes to CPLR 3001]" (id. at pp. 311-312).[2]

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[2] The effect of other adequate remedies on the availability of declaratory relief has undergone various convolutions. Careful reading of those cases that have mentioned the availability of other remedies reveals that the actual concern was the standard for reviewing the exercise of discretion in dismissing an action [see, e.g., Gaynor v. Rockefeller, 15 NY2d 120, 132; Rockland Light and Power Co. v. City of New York, 289 NY 45, 50-51). It is worth noting at this juncture that, in Gaynor and Rockland Light, descriptions of declaratory judgment as an "extraordinary remedy" are misnomers.

In summary, declaratory relief is available in a wider range of circumstances than is prohibition. The jurisdictional impediments to obtaining declaratory judgment are virtually coextensive with those to any normal lawsuit, while a writ of prohibition, by definition, may be granted only in restricted situations. Insofar as strictly jurisdictional factors are concerned, then, there is nothing to bar a district attorney from seeking an interpretation of a penal statute.

Policy considerations, however, may militate against entertaining an action for declaratory judgment that is instituted to challenge a criminal court's ruling. On this basis, both declaratory relief and prohibition have been limited as a means for attacking penal statutes or court rulings. On reviewing the reasons underlying those decisions, it is concluded that the action here is proper.

In the past, prohibition was deemed a

proper vehicle for challenging an interlocutory order of a criminal court. In People ex rel. Lemon v. Supreme Court (245 NY 24), the court approved the issuance of a writ to prohibit a trial court from enforcing an order requiring the prosecutor to divulge information to a criminal defendant. Chief Judge Cardozo, writing for the court, noted that prohibition was appropriate because the order could not be appealed, that there was no other remedy available, and that "[t]he course of the trial might be changed with the possible result that justice would miscarry, for a penalty of disobedience was to be the exclusion of the evidence" (id. at 35). This position was tacitly reaffirmed in Matter of Hogan v. Rosenberg (24 NY2d 207, revd on other gnds sub nom Baldwin v. New York, 399 US 66). Neither the parties nor the court there questioned the propriety of seeking

a writ to prohibit a court from granting a jury trial in direct contravention to a statute.

This position, of course, has been abandoned (see Matter of Gold v. Gartenstein, 54 NY 2d 627, supra). A court cannot be said to be acting without power merely because it issues an arguably erroneous ruling in a case that is otherwise properly before it (see Matter of State of New York v. King, 36 NY2d 59, supra). Of primary concern in King was the potential for "protracted and multifarious appeals and collateral proceedings" that would thereby prevent the speedy disposition of criminal cases (id. at 63). Prohibition, therefore, may be used for collateral review of an error of law "only where the very jurisdiction and power of the court are in issue" (Matter of Steingut v. Gold, 42 NY2d 311, 315).

Declaratory relief, on the other hand,

generally seeks a determination of rights before a "wrong" occurs, rather than collateral review of a court's ruling. In that context, it has been used to test penal statutes. Two tacks have been taken in seeking declaratory relief with regard to criminal laws. First, some have sought a determination whether particular conduct violates some penal law. The other has been to test the constitutional validity of a statute. This court generally has held that the latter is proper; the former is more circumscribed (Matter of Storer, 52 NY2d 363, 382).

The lead case is Reed v. Littleton (275 NY 150), in which the owner of a greyhound racing track attempted to obtain a judgment declaring that a complicated "option" plan maintained by him was not a gambling scheme prohibited by the Penal Law. He instituted the action after being acquitted once of illegal gambling, but after the prosecutor had

given notice of his intent to file further charges. This court held that declaratory relief was not available because the validity of the statute was not at issue and there was no assurance that the circumstances or the prosecutor's proof would not vary in the future (see id. at pp. 153-154). The court was loath to impede or interfere with the executive branch's administration of the criminal law, as would occur if the courts decided in civil proceedings whether certain behavior was criminal, but noted that this interference would not occur in declaring the constitutional validity of a statute (see id. at p. 156). Finally, the court commented that allowing actions for declaratory judgment in such circumstances would only delay criminal justice, not expedite it (see id. at p. 157).

Although a declaratory judgment often revolves around a particular set of facts, "[t]he remedy is available in cases 'where a

constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved' (Dun & Bradstreet, Inc. v. City of New York, [276 NY 198, 206]; Bank of Yorktown v. Boland, 280 NY 673.) The remedy, however, is not available to restrain the enforcement of a criminal prosecution where the facts are in dispute or open to different interpretations" (New York Operators Foreign Trade Zone v. State Liquor Authority, 285 NY 272, 277). In New York Operators, the plaintiff imported liquor into a trade zone, where it diluted the spirits, repackaged them, and then shipped them to other parts of the United States or to foreign countries. The plaintiff had not obtained a distiller's license and potentially faced criminal charges as a result. This court approved the use of declaratory relief to determine whether a license was required as "[t]he nature and purpose of the acts here

sought to be tested are not disputed" (id. at 278).

One example of an appropriate use of a declaratory judgment action to challenge a criminal statute further demonstrates the distinction between that remedy and prohibition. In Fenster v. Leary (20 NY2d 309), the plaintiff had been thrice arrested and acquitted for vagrancy. After the third arrest, he sought a writ of prohibition on the ground that the penal statute was unconstitutional. The lower courts denied prohibition, which was affirmed on the sole ground that the remedy was discretionary (see Matter of Fenster v. Criminal Ct. of City of N.Y., 17 NY2d 641). Having been acquitted for the third time, Fenster sought a declaration that the vagrancy statute was unconstitutional on its face. This court held the procedure to be proper under the circumstances as the plaintiff was challenging the statute's validity, and

not its application to disputed facts (see Fenster v. Leary, supra, at p. 312).

The task, then, is to determine whether a declaratory judgment may be sought to review an interlocutory criminal court ruling without running afoul of the policies underlying the limitations on obtaining a writ of prohibition in the same circumstances. The primary concerns are to avoid litigating factual issues in proceedings collateral to the criminal trial while also shunning collateral appeals that will delay the criminal trial.

With this in mind, it can be stated that a declaratory judgment attacking a criminal court's interlocutory ruling may be granted when the controversy is over the validity of a statute, the determination of which does not require resolving any factual disputes, and there is no immediate attempt to prevent the criminal court from proceeding on the course which it has charted by its ruling.

Furthermore, the criminal court's ruling must have an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases. Put another way, the situation must be one where it can be assumed that the question will recur in other prosecutions and the criminal court will decide it in the same way. Inasmuch as a defendant always has available a right to appeal, only an application for declaratory relief by the People should be entertained (see Kelly's Rental v. City of New York, 44 NY2d 700). The recurring nature of the issue, therefore, should pose a risk of significantly obstructing the task of administering criminal justice by imposing an undue burden on prosecutors and the courts. Although this court declines today to expressly limit when such an action may be brought, it is noted that this concern over obstructing the speedy resolution

of cases suggests that it is most appropriate when the challenge is to a ruling on how a trial is to be conducted. This "procedural" type of question is also the sort that is likely to recur and to be decided in the same manner regardless of the facts underlying the criminal charges. On the other hand, mere evidentiary rulings would not be proper subjects. Finally, the appropriate parties do not include the individual defendant in the case where the challenged ruling was made; as to him or her, there is another pending proceeding and the controversy has been decided (cf. Woollard v. Schaffer Stores Co., 272 NY 304, 311, supra). As a corollary, the action for declaratory judgment cannot seek any injunction against the individual defendant or the criminal court.[3]

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[3] This court states no view on the propriety of the District Attorney's returning to the criminal court and seeking reargument on the basis of the declaratory judgment.

Applying these factors to the instant proceeding, it is apparent that declaratory relief is proper. Judge Erlbaum ruled that CPL 340.40 (subd 2) was unconstitutional as applied to prostitution defendants in New York City. The nature of the ruling clearly makes it one that will be repeated unchanged in future prosecutions. Its potential impact on the criminal justice system is manifest from Judge Erlbaum's own decision. In 1979, a total of only 15 out of 14,247 prostitution cases went to trial in the Manhattan Criminal Court (see People v. Link, 107 Misc. 2d 973, 980, n. 55, supra). It can be expected that, if jury trials were available, far more prostitution defendants would demand trials, which would overwhelm the courts and prosecutors by consuming large amounts of time for selecting juries and would cause unmanageable delays.

In approving the use of declaratory judgment in the present situation, it is

incumbent upon this court to caution that this doctrine is to be used carefully and wisely. The extent to which this relief may be invoked remains to be developed.

Having concluded that declaratory relief was a proper remedy under the circumstances here, the merits of the decision below must be addressed. As noted, Judge Erlbaum concluded that prostitution is a "serious" crime and thereby comes within the scope of the Sixth Amendment's guarantee of a trial by jury. In so holding, he acknowledged the relatively minimal sentence, but reasoned that the length of incarceration was only one of several factors that may be considered.

Respondents devote an extensive portion of their argument to tracing the history of prostitution laws; the legal, moral, and psychological implications of prostitution; and the importance private citizens and public officials

place on eradicating prostitution. The effect of respondents' argument, however, would be to allow each judge to make a subjective decision on the seriousness of prostitution as an offense requiring a jury trial.

The analysis adopted by respondents stumbles at its threshold. Although earlier cases may have considered various factors of a crime (see, e.g., District of Columbua v. Colts, 282 U.S. 63; Schick v. United States, 195 U.S. 65; Natal v. Louisiana, 139 U.S. 621; Callan v. Wilson, 127 U.S. 540), recent Supreme Court decisions have emphasized the length of sentence to the exclusion of virtually everything else. The penalty is deemed of major relevance, a gauge of the locality's social and ethical judgments on the heinousness of the offense (see Duncan v. Louisiana, 391 U.S. 145, 159-160). "In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually

imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense" (Frank v. United States, 395 U.S. 147, 149). In Duncan, it was suggested that all offenses permitting imprisonment for more than six months would be serious crimes requiring jury trial. This objective criterion (see Frank v. United States, supra, at p. 148) has been elevated into a rule: "[O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes" (Codispoti v. Pennsylvania, 418 U.S. 506, 512).

Under this standard, it must be concluded that, as applied to prostitution charges, CPL 340.40 (subd 2) does not violate the

Sixth Amendment. Prostitution is a Class B misdemeanor (Penal Law, §230.00), which is punishable by a maximum imprisonment of three months. Consequently, prostitution is a "petty" offense within the meaning of the Sixth Amendment and, hence, there is no right to a jury trial.

It is worth commenting on the reasons why a subjective standard is not employed. The overriding problem would be the lack of predictability and consistency in determining when a jury trial would be granted. Evaluation of an offense's "seriousness" could vary from county to county, town to town, or even court to court. As a result, persons charged with identical offenses would find that their right to a jury depended only on the judge before whom they happened to appear, not on the offense charged.

A second concern is that, in establishing sentences, the Legislature must be presumed to

have weighed public opinion and history, and to have been aware of the civil implications of conviction. Indeed, this presumption implicitly underlies the Supreme Court's emphasis on sentence length as the indicator of a crime's seriousness. To allow a judge to weigh these same criteria and reach a different conclusion as to a crime's seriousness would be to permit an improper usurpation of the legislative function.

As discussed, it is an abuse of discretion for a court to entertain an action for declaratory judgment when there is pending between the parties an action that will fully dispose of the controversy. This error is compounded when the controversy has already been decided. Thus, it was improper for Supreme Court to have heard the action as against respondents Link and Meltsner, the defendants in the criminal action.

Accordingly, the order of the Appellate Division should be modified by striking the declaration that respondents Link and Meltsner are not entitled to a jury trial on the charges of prostitution pending against them in New York City Criminal Court actions bearing docket numbers N968606 and N968607 and by dismissing the petition as to respondents Link and Meltsner, and, as so modified, affirmed, without costs.

* * * * *

Order modified in accordance with the opinion herein and, as so modified, affirmed without costs. Opinion by Chief Judge Cooke. Judges Jasen, Jones, Wachtler, Meyer and Simons concur.

Decided June 7, 1983.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 16, 1982

Present--Hon. Francis T. Murphy Presiding Justice
Joseph P. Sullivan
John Carro
Vincent A. Lupiano
Samuel J. Silverman, Justices

In the Matter of the Application of Robert M. MORGENTHAU, District Attorney of New York County, on behalf of the People of the State of New York,

Petitioner-Respondent,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules, 14319

-v-

William M. ERLBAUM, a Judge of the Criminal Court of the City of New York, New York County; the Judges of the Criminal Court of the City of New York, New York County; and Carol Link and Debra Meltsner, defendants in the Criminal Court of the City of New York, New York County, New York County Docket Nos. N968606 and N968607,

Respondents-Appellants.

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (Pecora, J.), entered on January 26, 1982, which, inter alia, granted petitioner-respondent's motion to convert his Article 78 proceeding into an action for declaratory judgment, and declared that Section 340.40, subd. 2 of CPL is constitutional,

And said appeal having been argued by Richard D. Emery of counsel for appellants, and by Robert M. Pitler of counsel for respondent; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI

In the Matter of the Application of Robert M. MORGENTHAU, District Attorney of New York County, on behalf of the People of the State of New York, Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-v-

William M. ERLBAUM, a Judge of the Criminal Court of the City of New York, New York County; the Judges of the Criminal Court of the City of New York, New York County: and Carol Link and Debra Meltsner, defendants in the Criminal Court of the City of New York, New York County, New York County Docket Nos. N968606 and N968607, Respondents.

Supreme Court, Special Term

New York County, Part 1.

Nov. 10, 1981

County district attorney moved for a judgment, pursuant to Article 78, to prohibit enforcement of an order of the criminal court declaring Criminal Procedure

Law unconstitutional in denying a jury trial to a person charged with prostitution. The Supreme Court, New York County, Special Term, Pecora, J., held that: (1) order by criminal court judge was collaterally appealable by the people, and (2) since prostitution is punishable by only three-month imprisonment, it is not a "serious" offense for which jury trials are mandated by the Sixth Amendment to the United States Constitution; therefore, Criminal Procedure Law is not unconstitutional.

Order accordingly.

1. Prohibition 10(3)

As a general rule, mere errors of law by a criminal court judge are not appealable collaterally; rather, it is only in cases where the judge has exceeded his authorized power that the Supreme Court may review an interlocutory order of the criminal court; however, Supreme Court may grant relief in

the nature of prohibition to restrain an inferior court from exceeding its authorized powers in a proceeding over which it has jurisdiction.

2. Prohibition 1

In deciding whether or not an order should be collaterally appealable the courts should consider several important factors, namely, the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal, and the effectiveness of prohibition as a remedy where no other remedy exists.

3. Prohibition 5(4)

When a criminal court judge holds a statute to be unconstitutional, thereby prejudicing the people in creating delay in a criminal justice suit, the people should be able to collaterally appeal that judge's decision in the Supreme Court.

4. Jury 22(2)

Since prostitution is punishable by only three-month imprisonment, it is not a "serious" offense for which jury trials are mandated by the Sixth Amendment to the United States Constitution; therefore, Criminal Procedure Law which denies a jury trial to persons charged with the crime of prostitution in the city of New York is not unconstitutional. McKinney's CPL §340.40, subd. 2; U.S.C.A. Const. Amend. 6.

Robert M. Morgenthau, Dist. Atty. of New York County (Amy Jane Rettew, New York City, of counsel) for petitioner.

Richard Emery and Robert Abrams, Atty. Gen., New York City (Susan L. Yarbrough, New York City, of counsel) for respondent Erlbaum.

Kenneth Fields, New York City, for respondents Link and Meltsner.

PECORA, Judge:

Motions under calendar numbers 100, 101

and 102 are consolidated for disposition.

Petitioner Robert J. Morgenthau, District Attorney of New York County, moves for a judgment, pursuant to Article 78 of the CPLR, to prohibit enforcement by Judge William M. Erlbaum, or any other judge of the Criminal Court of New York County, of an order of that court dated February 23, 1981. Respondent Erlbaum moves to dismiss pursuant to CPLR § 7804(f).

The factual background is as follows: on February 23, 1981, Judge Erlbaum rendered a decision in People v. Link and Meltsner, 436 N.Y.S.2d 581, wherein he declared Criminal Procedure Law §340.40(2) unconstitutional in that it denied a jury trial to persons charged with the crime of prostitution in the City of New York. In essence, Judge Erlbaum's order rested on the premise that prostitution, although punishable by only three-months imprisonment, is a "serious" offense for which jury trials are mandated by the Sixth Amendment to the United

States Constitution. Petitioner's initial motion was in the nature of a writ of prohibition to prevent implementation of the subject decision of Judge Erlbaum and to restrain other judges from acting in a similar manner in regard to prostitution cases. Petitioner thereafter moved for an order converting this proceeding to an action for declaratory judgment.

This is the type of case which, in this court's opinion is ripe for declaratory judgment. The only issue is one of law. The parties herein all have a stake in its outcome sufficient to ensure adequate adversary presentation of all the pertinent questions of law. A judgment in this case would resolve the constitutionality of CPL §340.40(2) for all prostitution cases, whereas a dismissal would leave the criminal courts in a state of confusion and disuniformity. We are bound by the decision in Gold v. Gartenstein, 54 N.Y.2d 627, 442 N.Y. S.2d 504, 425 N.E.2d 892, (1981) holding that

prohibition is not an appropriate remedy in this type of case, but this court is not foreclosed from exercising its jurisdiction under CPLR Article 30.

[1] As a general rule, mere errors of law by a Criminal Court Judge are not appealable collaterally. It is only in cases where the judge has exceeded his authorized powers that this court may review an interlocutory order of the Criminal Court. Matter of Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (1971); Proskin v. County Court of Albany County, 30 N.Y.2d 15, 330 N.Y.S.2d 44, 280 N.E.2d 875 (1972); Matter of State v. King, 36 N.Y.2d 59, 364 N.Y.S.2d 879, 324 N.E.2d 351 (1975).

The justification for this rule was best explained in King, supra, at p. 63, 364 N.Y. S.2d 879, 324 N.E.2d 351:

> "Litigation may be compounded unduly by protracted and multifarious appeals and collateral proceedings frustrating

> the speedy determination of disputes.--Were allowance of this kind of proceeding to become a precedent, one would have to anticipate innumerable proceedings in all sorts of criminal matters to review allegedly prejudicial errors of law for which there would be no eventual appellate review or only appellate review after final judgment, and then only of conviction."

Nevertheless, the Court of Appeals has permitted the Supreme Court to grant relief in the nature of prohibition "to restrain an inferior court from exceeding its authorized powers in a proceeding over which it has jurisdiction." Lee, supra, 27 N.Y.2d at p. 437, 318 N.Y.S.2d 705, 267 N.E.2d 452.

Thus, in Proskin, supra, the Court held that an order granting a defendant unlimited inspection of grand jury minutes to help him prepare his defense was an excess of authority for which prohibition was a proper remedy. See also, Jaffe v. Scheinman, 47 N.Y.2d 188, 417 N.Y.S.2d 241, 390 N.E.2d 1165 (1979).

[2] In La Rocca v. Lane, 37 N.Y.2d 575,

376 N.Y.S.2d 93, 338 N.E.2d 606 (1979) the Court held that a Criminal Court Judge's order prohibiting an attorney from wearing his clerical garb in court was collaterally appealable under Article 78 (the court ultimately resolved the merits against the attorney). It is clear that "there is no sharp line between a court acting in error under substantive or procedural law and a court acting in excess of its powers." La Rocca, supra, at p. 580, 376 N.Y.S.2d 93, 33 N.E.2d 606 "Accordingly, in deciding whether or not an order should be collaterally appealable, the courts should consider several important factors, namely, "the gravity of the harm caused by the excess of power, the availability or unavailability of an adequate remedy on appeal, and the effectiveness of prohibition as a remedy where no other remedy exists." Matter of Dondi v. Jones, 40 N.Y.2d 8 at p. 13, 386 N.Y.S.2d 4, 351 N.E.2d 650;

La Rocca, supra, at p. 579-80, 376 N.Y.S.2d 93, 33 N.E.2d 606.

In distinguishing Proskin, the Court in King stated: "Not necessary to the result in Proskin, but relevant to the broad policy determining the interplay of actions and special proceedings arising from them, the review by prohibition of the order of inspection in that case did not delay the criminal action, but removed a major impetus to delay in the action and the prosecution of the other 15 indictments." King at p. 64, 364 N.Y.S. 2d 879, 324 N.E.2d 351.

In the case at bar, denying the right to a collateral appeal will only serve to create more delay in the criminal justice system by permitting Judge Erlbaum, and any other judge, to grant jury trials for every prostitution case before them. In addition, if review is not available in this case, there would be nothing to stop any judge from holding

that any petty crime is "serious" and ordering a jury trial. The resulting confusion resulting from a holding of nonreviewability far outweighs the burden of a collateral proceeding.

The petitioner herein has no adequate remedy at law. If the defendants Link and Meltsner are acquitted, there can be no appeal; if they are convicted, the District Attorney still cannot appeal from the prejudicial order. In short, a dismissal in this case will delay the speedy implementation of justice that the rule against collateral appeals was meant to protect.

Judge Erlbaum's actions may be characterized as an excess of authority. New York City Criminal Court Judges are authorized to grant jury trials only in cases where more than 6 months imprisonment is authorized by law. The statutory limitation on jury trials is not substantially different

from the statutory limitation placed upon the right to inspect grand jury minutes in Proskin. The judge's action in Proskin, like Judge Erlbaum's action here, is an error not of jurisdiction, but in construing the authorized powers granted to a judge.

It will not do to say that Judge Erlbaum had the right to decide the constitutionality of the statute, and, thus, his decision was "authorized." Could it be said that the judge in Proskin would have been within his authority to hold CPL §210.30(2) unconstitutional... and, that, had he done so, the Court of Appeals would have reached a different decision? This court thinks not. Could a judge hold that a District Attorney's right to cross-examine witnesses is unconstitutional, or that his burden of proof is too lenient, and should such an order be unreviewable simply to preserve the uninterrupted flow of justice? Again, we must answer this question in the negative. To adopt such a position

would lead to the intolerable result that any time a judge holds a statute unconstitutional, that error would be unreviewable by this court, regardless of its damage to the criminal justice system.

[3] This court does not hold that any interlocutory order of a criminal court judge, no matter how trivial, should be reviewable, because that would create an intolerable amount of delay in the expedition of justice. We only hold that when a criminal court judge holds a statute to be unconstitutional, thereby prejudicing the People and creating delay in the criminal justice system, the People should be able to collaterally appeal that judge's decision in this court.

As hereinabove stated, this court has granted petitioner's motion to convert this proceeding into an action for a declaratory judgment (CPLR 103[c]). However, this conversion should have no effect upon the outcome of

the petitioner's application. The reviewability of Judge Erlbaum's order should not depend upon technical or procedural formalities.

We now proceed to the merits of Judge Erlbaum's decision.

[4] In Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the Supreme Court held that the states must provide a jury trial for all defendants charged with "serious offenses." In Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), the Court defined a "serious offense" as one which is punishable by more than 6 months in prison.

The New York State Legislature restructured its Criminal Justice system to conform with the Baldwin decision and enacted CPL §340.40(2). (See, Practice Commentary to CPL §340.40, McKinney's 1971 Ed: by Richard G. Denzer).

It is the opinion of this Court that CPL §340.40(2) is constitutional under the

standard set by Baldwin, supra, a standard which has not been changed in subsequent Supreme Court decisions. The State has the right to limit the availability of jury trials to preserve "the benefits that result from speedy and inexpensive non-jury adjudications." Baldwin, supra, at p. 73, 90 S.Ct. at p.1890.

Although a 6 month cut-off point might seem arbitrary to some, the Supreme Court has drawn the line at 6 months in order to prevent the confusion that would result were each judge permitted to decide which crimes he or she considered serious. Furthermore, this court is not persuaded by Judge Erlbaum's characterization of prostitution as a "serious" crime. His argument is belied by one of his own footnotes, in which he states that only 15 prostitution cases out of 14,247 in 1979 went to trial (see footnote 55 of Judge Erlbaum's decision). This statistic hardly represents a "serious" treatment of the crime of

prostitution, either by judges or by prosecutors.

Nor will this court permit itself to engage in a discussion of society's perception of prostitution, although Judge Erlbaum's conclusions on the matter are highly debatable. This type of discussion would not be particularly relevant. In classifying prostitution as a Class B misdemeanor, the State has decided that prostitution is not "serious" enough to bear the expense of jury trial. This decision must be respected.

Accordingly, this court declares that CPL §340.40(2) is constitutional, and that defendants Link and Meltsner are not entitled to a jury trial on the charges of prostitution pending against them in New York City Criminal Court actions bearing Docket numbers N968606 and N968607.

The PEOPLE of the State of New York

v.

Carol LINK and Debra Meltsner,
Defendants.

Criminal Court of the City of New York,
New York County, Part AP 9.

Feb. 23, 1981.

Defendants, who were charged with prostitution, moved for trial by jury. The Criminal Court, City of New York, County of New York, William M. Erlbaum, J., held that prostitution, no matter how lightly punished, is a serious crime and many not be prosecuted without the right to trial by jury; thus, to the extent that section which directs that trial shall be before a single judge makes jury trial unavailable to defendants, section contravenes the Sixth and Fourteenth Amendments to the Federal Constitution and is null.

Motion granted.

1. Jury 22(1)

Whether a crime is serious or petty for purposes of determining right to trial by jury can be determined by considering whether crime is one of moral turpitude, whether it is malum in se or malum prohibition, severity of the authorized penalty, or, if no penalty limit is fixed, then the penalty actually imposed and whether the crime was indictable at common law.

2. Jury 22(1)

Fixed dividing line of six months incarceration for purposes of determining whether defendant was entitled to a jury trial was only intended to be the criterion of whether or not an offense is serious where it is not otherwise inherently serious apart from sentence to which the defendant is exposed.

3. Jury 22(2)

Prostitution, no matter how lightly punished, is a serious crime and may not be

prosecuted without right to trial by jury. CPL 340.40, subd. 2; U.S.C.A. Const. Amends. 6, 14.

4. Constitutional Law 267

Criminal Law 248

Statute providing that in the New York City Criminal Court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial contravened the Sixth and Fourteenth Amendments and was null and void insofar as it denied jury trial to defendants charged with offense of prostitution. CPL 340.40, subd. 2; U.S.C.A. Const. Amends. 6, 14.

Robert M. Morgenthau, Dist. Atty. of the County of New York, for the People; Asst. Dist. Atty. Jane Sachs, of counsel.

Kassner & Detsky, P.C., New York City, for defendants; Kenneth R. Fields, New York City, of counsel.

Opinion and Order

WILLIAM M. ERLBAUM, Judge.

Defendants, Carol Link and Debra Meltsner, are charged with the crime of prostitution.[1] They have moved for trial by jury, claiming that Criminal Procedure Law Section 340.40, subdivision 2[2] (which directs that the trial shall be before a single judge) is unconstitutional, first, because prostitution is not a

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1 N.Y. Penal Law Section 230.00 (McKinney 1980); it places the offense in the class B misdemeanor category.

2 N.Y. Crim. Proc. Law Section 340.40(2) (McKinney 1971) provides that:

> "In any local criminal court a defendant who has entered a plea of not guilty to an information which charges a misdemeanor must be accorded a jury trial, conducted pursuant to article three hundred sixty, except that in the New York City criminal court the trial of an information which charges a misdemeanor for which the authorized term of imprisonment is not more than six months must be a single judge trial. The defendant may at any time before trial waive a jury trial in the manner prescribed in subdivision two of section 320.10, and consent to a single judge trial." (footnote omitted)

"petty" but a "serious" offense requiring trial by jury under the federal Constitution,[3] second, because that Section denied them "equal protection" by withholding the right to trial by jury in class B misdemeanor[4] trials in New York City while permitting jury trials of such cases in the remainder of the State.

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3 The Constitution provides that: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury...." U.S. Const. Art. III, Section 2, Clause 3. The sixth amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...". U.S. Const. Amend. VI.

The right to trial by jury, held not to apply to so-called petty or trivial offenses (Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 [1888]), was made applicable to the States in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491(1968).

Defendants herein do not make any claim under the New York Constitution, which leaves the mode of trial entirely up to the legislature. N.Y. Const. Article 6, Section 18a (McKinney 1960).

4 A class B misdemeanor crime exposes the convicted defendant to imprisonment which shall not exceed three months. N.Y. Penal Law Section 70.15(2)(McKinney 1975).

I.

[1] Whether a crime is serious or petty can be determined by several criteria.[5] In Duncan v. Louisiana,[6] the Supreme Court held that the length of any sentence of imprisonment that may be imposed is a major but not exclusive criterion. In Baldwin v. New York,[7]

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5 These include whether the crime is one of moral turpitude (Schick v. United States, 195 U.S. 65, 67, 24 S. Ct. 826, 49 L.Ed. 99 [1904]); whether it is malum in se or malum prohibition (District of Columbia v. Colts, 282 U.S. 63, 73, 51 S.Ct. 52, 53, 75 L.Ed. 177 (1930); Natal v. Louisiana, 139 U.S. 621, 622, 11 S.Ct. 636, 637, 35 L.Ed. 288 [1891]); the severity of the authorized penalty (Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed. 2d 437 [1970]) or, if no penalty limit is fixed, then the penalty actually imposed (Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 [1968]), whether the crime was indictable at common law (Callan v. Wilson, 127 U.S. 540, 555, 8 S.Ct. 1301, 1306, 32 L.Ed. 223 [1888]); and perhaps others. The categories "serious" and "petty" are "ill-defined, if not ambulatory...", such that "the definitional task necessary falls on the courts...". Duncan v. Louisiana 391 U.S. 145, 160, 88 S.Ct. 1444, 1453, 20 L.Ed. 491 (1968).

6 391 U.S. 145, 159, 88 S.Ct. 1444, 1452, 20 L.Ed. 2d 491 (1968).

7 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed. 2d 437 (1970).

the Court held that exposure to incarceration for more than six months conclusively establishes the crime charged as serious.

Both Duncan and Baldwin certified the continuing validity of earlier holdings[8] that the nature of an offense and a defendant's exposure to disabilities other than incarceration may also qualify that offense as serious.

Thereafter, the Supreme Court decided Codispoti v. Pennsylvania,[9] involving a criminal contempt conviction. The opinion contained language which the District Attorney herein

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8 Callan v. Wilson, 127 U.S. 540, 88 S. Ct. 1301, 32 L.Ed. 223 (1888); Natal v. Louisiana, 139 U.S. 621, 11 S.Ct. 636, 35 L.Ed. 288 (1891); Schick v. United States, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904); District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930); District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937); Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed. 2d 629 (1966); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed. 2d 538 (1968).

9 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed. 2d 912 (1974).

relies upon in opposing defendant's motion:

> "...our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes."[10]

The District Attorney then argues that inasmuch as convicted prostitutes may be jailed for up to only three months, prostitution is ipso facto a petty offense.

[2] To the contrary, I hold that Codispoti's fixed dividing line of six months was only intended to be the criterion of whether or not an offense is serious where it is not otherwise inherently serious apart from the sentence to which the defendant is exposed.[11]

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10 418 U.S. at 512, 94 S.Ct. at 2691.

11 United States v. Woods, 450 F.Supp. 1335, 1340 (D. Md. 1978); United States v. Sanchez-Meza, 547 F.2d 461, 463-5 (9 Cir. 1976); Brady v. Blair, 427 F. Supp. 5, 9 (S.D. Ohio, E.D. 1976); Connolly, "The Petty Offense Exception and the Right to a Jury Trial," 48 Ford L. Rev. 205. 218 (1979). Cases going both ways are cited in Gold v. Gartenstein, (N.Y.) 100 Misc.2d 253, 418 N.Y.S.2d 852 (1979).

Taylor v. Hayes,[12] announced the same day as Codispoti, explicitly recognized that some crimes are serious "regardless of the penalty involved."[13] In Ludwig v. Massachusetts,[14] the Court again observed that the length of a defendant's exposure to jail is "usually"[15] but not exclusively the measure of the seriousness of the charges. In Scott v. Illinois,[16] the Court again noted that even as to offenses carrying incarceration of six

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12 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

13 418 U.S. at 496, 94 S.Ct. at 2702, quoting Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477, 1487, 20 L.Ed. 2d 522 (1968).

14 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed. 2d 732 (1976).

15 427 U.S. at 624-5, 96 S.Ct. at 2785.

16 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

months or less, trial by jury is only unnecessary "if they otherwise qualify as petty offenses...".[17]

II

Like the institution of marriage[18] itself, prostitution is older than the common law.[19]

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17 440 U.S. at 371, 99 S.Ct. at 1161, quoting Duncan v. Louisiana, 391 U.S. 145, 159, 88 S.Ct. 1444, 1452, 20 L.Ed.2d 491 (1968).

18 See Griswold v. Connecticut, 381 U.S. 479, 485-6, 85 S.Ct. 1678, 1682, 14 L.Ed. 2d 510 (1965).

19 Concerning the ancient character of rules aimed at "the world's oldest profession" (People v. Smith, 44 N.Y.2d 613, 617-8, 407 N.Y.S.2d 462, 378 N.E.2d 1032 [1978]), see People ex rel. Duntz v. Coon, 67 Hun. 523, 51 N.Y.St. Rep. 339, 341, 22 N.Y.S. 865 (1893); People v. Bailey (N.Y.), 165 Misc. 2d 772, 773, note 1, 432 N.Y.S.2d 789 (1980).
Although prostitutional activity of a purely private and clandestine nature was brought to the attention of the Church courts in the Thirteenth Century England (and thus it has been claimed that prostitution was not a crime at common law, Bailey v. United States, 98 F.2d 306, 308 [C.A.D.C. 1038); Austin v. United States, 299 A.2d 545 [C.A.D.C. 1973]; Marshall v. United States, 302 A.2d 746 [C.A.D.C. 1973]) by the time of the American common law, such activity was prosecuted in common law courts. Rasmussen v. United States, 197 U.S. 516, 25 S.Ct. 514, 49 L.Ed. 862 (1905); State v. Waymire,

(fn. cont. on next page)

The District Attorney does not dispute that even if there were no incarceration involved, a prostitution conviction results in profound consequences for the person convicted.

(fn. cont. from preceding page)
52 Or. 281, 97 P. 46, 48 (1908); Warren v. People (N.Y.) 3 Parker Cr.R. 544, 547 (1857); Miller v. Commonwealth, 88 Va. 618, 16 L.R.A. 441, 14 S.E. 161, 162 (1892); Ogden v. City of Madison, 111 Wis. 413, 87 N.W. 568, 570 (1901), Commonswealth v. Wesley, 171 Pa. Super, 506, 91 A.2d 298, 300 (1952); Gaither v. United States, 251 A.2d 644, 645 (C.A.D.C. 1969).

Nor is a common law antecedent an indispensable requirement before an offense may be deemed serious; the scope of the sentence alone may require that designation; e.g. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968) (simple assault and battery which was not an indictable offense at common law. Goldman v. Kautz, 111 Ariz. 431, 531 P.2d 1138 (1975); United States v. Newberne, 427 F.Supp. 361, 362 [E.D. Ky. 1977]); e.g. Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968) (Criminal contempt, which, likewise, was not an indictable offense at common law: see Cheff v. Schnackenberg, 384 U.S. 373, 381, note 1, 86 S.Ct. 1523, 1526, n.1, 16 L.Ed.2d 629 (Harlan, J., concurring)(1966); United States v. Barnett, 376 U.S. 681, 696, 7, 84 S.Ct. 984, 992 93, 12 L.Ed.2d 23 and at pages 750-1, 84 S.Ct. at pages 1018 [where Goldberg, J., dissented] [1964]

See also, District of Columbia v. Clawans, 300 U.S. 617, 627, 630, 57 S.Ct. 660, 663, 664, 81 L.Ed. 843 (1937); City Court of City of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972); United States v. Woods, 450 F.Supp. 1335, 1342-5 (D.Md. 1978).

From Biblical[20] times and throughout the world[21] today, to mark a woman a prostitute is to designate her a pariah.[22] Whether she is described as a "hustler," a "hooker," a "bawd" or a "harlot," a "Biffer," a "trull," "pigmeat" or a "whore,"[23] the prostitute

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20 People v. Bailey (N.Y.), 105 Misc.2d 772, 773, note 1, 432 N.Y.S.2d 789 (1980).

21 The New York Times, 7-4-80; page 1 reported the execution by stoning of a woman convicted of prostitution in Iran.

22 Battles v. Tyson, 77 Neb. 563, 110 N.W. 299, 300 (1906); Connor v. Niemiec (N.Y.), 25 A.D.2d 857, 269 N.Y.S.2d 788 (2nd Dept. 1966); N.Y. Civil Rights Law Section 77 (McKinney 1976).

23 C. Winick and P.M. Kinsie, The Lively Commerce, Chicago, Quadrangle Books, 1971, page 41; People v. Bailey (N.Y.), 105 Misc.2d 772, 773, note 1, 432 N.Y.S.2d 789 (1980).

bears the opprobrium of "the fallen woman."[24] Conviction exposes her to banishment by deportation[25] to a foreign land; to denial of entry[26] into America; to summary divorce[27] at the inception of her husband; to being declared an unfit mother and deprived of the custody[28]

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24 Rosenbleet and Parienta, "The Prostitution of the Criminal Law," 11 Amer. Crim.L.Rev. 373, 391 (1973) citing In Re Carey, 57 Cal. App. 297, 207 P. 271 (1922).

25 8 U.S.C.A. 125 (a)(12); Marlowe v. United States Immigration and Naturalization Service, 457 F.2d 1314 (9 Cir. 1972); Greene v. Immigration and Naturalization Service, 313 F.2d 148 (9 Cir. 1963).

26 8 U.S.C.A. 118a(a)(12).

27 S.T. Grand, Inc. v. City of N.Y., 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973).

28 See People v. Vera Anderson, et al., Crim. Ct. N.Y.Co., Part AP 3, Docket Nos. N9630498, ON002954, 7-10-80, Soloff, J., page 3.

and visitation of her children; to expulsion from her residence;[29] to exclusion from many forms of endeavor;[30] and, with every expectation that her word of accusation will carry little weight in court[31] (or, who would believe her?), to being freely raped.[32]

Judges have described prostitutes as

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29 N.Y. Real Prop. Law Section 231 (McKinney Pocket Part 1980), N.Y. Mult. Dwelling Law Sections 352, 353, 354 et seq. (McKinney 1974); N.Y. Real Prop. Actions and Proceedings Law Section 715 (McKinney 1979 & Pocket Part 1980); N.Y. Public Health Law, Title II, Art. 23, Sections 2320 2334 (McKinney 1977); Admin. Code of the City of N.Y., Chap. 16, Title C: Hauer v. Manigault (N.Y.), 160 Misc. 758, 290 N.Y.S. 778 (1936).

30 E.g. N.Y. Alcoholic Beverage Control Law Section 102(2)(h) (McKinney Pocket Part 1980)

31 McCarthy v. McCarthy 143 N.Y. 235, 38 N.E.288 (1894); Moller v. Moller, 115 N.Y. 466, 22 N.E. 169 (1889).

32 See People v. Jose Gonzalez, 96 Misc.2d 639, 409 N.Y.S.2d 497 (1978).

"malodorous and evil characters,"[33] perpetrators of "evil and wrongdoing,"[34] underminers of "public morals and decency...befitting good people,"[35] and as "vicious"[36] and "vile."[37] To great masses of people, the prostitute is "connected to other crime-related activities and is a significant factor in increasing such crimes as robbery, assault,

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33 Remedco Corporation v. Bryn Mawr Hotel Corp., 45 Misc. 2d 586, 257 N.Y.S.2d 525, 526 (1965).

34 Id., 257 N.Y.S.2d at 528.

35 Hauer v. Manigault, 180 Misc. 753, 290 N.Y.S. 778, 780 (1936).

36 Id., 290 N.Y.S. at 781.

37 People ex rel. Clark v. Keeper, 176 N.Y.465, 472 (1903)(Grey, J., dissenting).

and narcotic possession and sale."[38] They associate her with organized crime,[39] public indecency,[40] family instability,[41] the blight of tourist and commercial areas,[42] and the spread of venereal disease.[43]

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38 Rosenbleet and Pariente, "The Prostitution of the Criminal Law," 11 Amer. Crim. L. Rev. 373, 417 (1973); L'Hote v. New Orleans, 177 U.S. 587, 596, 20 S.Ct. 788, 791, 44 L.Ed. 899 (1900).

39 See People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433 (1938); Matter of P. (N.Y.), 92 Misc.2d 62, 79-80, 400 N.Y.S.2d 455 (1977), reversed sub. nom. In re Dora P., 68 A.D. 2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979).

40 Matter of P., supra, 92 Misc. 2d at 82, 400 N.Y.S.2d 455.

41 See Id. at 80-1, 400 N.Y.S.2d 455; Caminetti v. United States, 242 U.S. 470, 486-7, 37 S.Ct. 192, 194-95, 61 L.Ed. 442 (1916).

42 People v. Smith, 44 N.Y.2d 613, 618, 407 N.Y.S.2d 462, 378 N.E.2d 1032 (1978); People v. James, 98 Misc.2d 755, 415 N.Y.S.2d 342, 343 (1979).

43 N.Y. Public Health Law Section 2302 (McKinney 1977); People v. Johnson, 252 N.Y. 387, 169 N.E.619 (1930); People ex rel Krohn v. Thomas (N.Y.), 133 Misc. 145, 231 N.Y.S. 271 (1928); People v. Anonymous (N.Y.), 161 Misc. 379, 383, 292 N.Y.S.282 (1936); C. Winnick and P.M. Kinsie, The Lively Commerce, Chicago, Quadrangle Books, 1971, page 257.

At bottom, however, the quintessential thrust of the label "prostitute" is to denominate the creature to whom it is affixed as, through and through, unprincipled, a lowlife, one who would sell out any loyalty, desecrate any covenant, and, literally as well as characterologically as one willing to do just about anything for the right price.[44] It is well-nigh inevitable that a woman so branded will be banned from the office, the factory, the home and the church. Ultimately, as defendants claim without dispute, the convicted prostitute is likely to despise herself.[45]

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44 Carpenter v. People, 8 Barb. N.Y. 603, 610-11 (1850); Caminetti v. United States, 242 U.S. 470, 487, 37 S.Ct. 192, 195, 61 L.Ed. 442 (1916); United States v. Bitty, 208 U.S. 393, 402, 28 S.Ct. 396, 398, 52 L.Ed. 543 (1908).

45 Battles v. Tyson, 77 Neb. 563, 110 N.W. 299, 300 (1906); defendants' brief, pages 4-7 citing J. James, The Many Faces of Suicide: Indirect Self-Destructive Behaviors, New York, McGraw Hill, 1980, page 341 et seq., and K. Davis, "The Sociology of Prostitution," 2 Amer. Soc. Rev. 744 (1937).

If there is a class of cases more eligible than prostitution for designation as "serious," notwithstanding that incarceration for more than six months is not in the picture, I have yet to find it.[46]

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46 The few judicial opinions concerning prostitutional activity and the right to trial by jury, are inconclusive.

A. Some are pre-Duncan cases that turn upon principles of State law. Warren v. People (N.Y.), 3 Parker Cr.R. 544 (1857) (Yes); Miller v. Commonwealth, 88 Va. 618, 15 L.R.A. 441, 14 S.E. 161 (1892) (Yes); People v. Iverson (N.Y.), 46 App. Div. 301, 61 N.Y.S. 220 (2nd Dept. 1899) (No); People ex rel. Clark v. Keeper, 176 N.Y. 465 (1903) (Yes, by implication); People ex rel. St. Clair v. Davis (N.Y.), 143 App. Div. 579, 127 N.Y.S. 1072 (2nd Dept. 1911)(No, by implication); People v. Harding (N.Y.), 115 Misc. 298, 189 N.Y.S. 657 (1921)(No).

B. Other cases relate to local ordinances. Wong v. City of Astoria, 13 Or. 538, 11 P. 295 (1886) (No); Ogden v. City of Madison, 111 Wis. 413, 87 N.W. 568, 55 L.R.A. 506 (1901)(No); Commonwealth v. Wesley, 171 Pa. Super. 566, 91 A.2d 298 (1952) (Yes); Powers v. State (Fla. App.), 370 So.2d 854 (1979)(Yes).

C. One case, although apparently authoritative, is of old vintage and contains only sparse reference to the critical issue herein. Rassmussen v. United States, 197 U.S. 516.

D. Other cases are premised upon two strained assumptions, first, that prostitutional activity was not dealt with by the common law; second, that crimes without common law antecedents, are precluded from being deemed "serious," (see

(fn. cont. on next page)

III.

Ironically, the governmental authorities of New York County treat the crime of prostitution as serious. Desk appearance tickets in

(fn. cont. from preceding page)
note 19, supra). Bailey v. United States, 98 F.2d 306 (C.A.D.C. 1938)(No); Austin v. United States, 299 A.2d 545 (C.A.D.C. 1973) (No); Marshall v. United States, 302 A.2d 746 (C.A.D.C. 1973)(No).

E. One case is based upon what appears to me to be a false premise, to wit, that "(t)he guidelines laid down by the Supreme Court in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), recognized that the right to a jury trial is not so fundamental to be required as a matter of Due Process, if the maximum sentence for the crime charged is less than six months." (The legislature acted upon the same premise in enacting N.Y.Crim. Proc. Law Section 340.40(2); see Practice Commentary to that section [McKinney 1971]), People v. Cindy Long and Elizabeth Baker, N.Y.L.J. 6-21-79, page 10, col. 6 (Nardelli J.)(No). See notes 11 through 17 and accompanying text, supra.

F. A sixth grouping consists of cases where, for the most part, nobody contended and everybody simply assumed that prostitution was a "petty" offense, and where the only disputed issue was the equal protection issue posed by N.Y.Crim. Proc. Law Section 340.40(2)(McKinney 1971). People v. Cindy Long and Elizabeth Baker, supra (No), People v. June Taylor et ano., Crim.Ct.N.Y.Co. Part AP 1, Docket Nos. N4758 & N4777, 1980, 4-17-80 (Rotker, J.)(No), People v. Vera Anderson et al., Crim.Ct. N.Y.Co.,Part AP 3, Docket Nos. N963049 & ON002954, 7-10-80(Soloff,J.)(No).

lieu of arrest, used in a wide variety of misdemeanor cases including many involving moral turpitude and violence, are never used in prostitution cases.[47] Accused prostitutes are always subjected to formal arrest.

The Criminal Justice Agency routinely interviews defendants and submits reports to the arraigning magistrate in every felony category and in every type of misdemeanor case except one, concerning defendants' eligibility to be released upon their own recognizance. The one exception is the case of prostitution,

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47 N.Y.Crim. Proc. Law Article 150 (McKinney 1971); People v. Izsak (N.Y.), 99 Misc.2d 543, 552, 416 N.Y.S. 2d 1004 (1979); Cf. People v. Bob Doe, N.Y.L.J., 4-6-79, page 12, col. 3 (Rettinger, J.).

where those steps are never taken.[48]

Adjournments in contemplation of dismissal[49] are granted upon the application of the District Attorney to first-offenders in a wide variety of misdemeanor cases. The District Attorney never makes this application in prostitution cases.[50]

Likewise, the District Attorney freely consents to the acceptance of guilty pleas to

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48 Directive No. D-48(Nov. 16, 1976) from Julian M. DeLaRosa, then Chief Clerk/Deputy Executive Officer--Operations, to Albert Feureisen, then Acting Borough Chief Clerk/New York Court Clerks--N.Y.Co.; Cf. People v. C.S., Crim. Ct. N.Y.Co., Part AP 9, Docket No. N961405, 11-28-79, Berkman, J., pages 3-4; N.Y.L.J. 12-10-79, page 13, col. 5.

49 N.Y.Crim.Proc. Law Section 170.55 (McKinney Supp. Pamphlet 1980).

50 People v. Izsak (N.Y.), 99 Misc.2d 543, 552, 416 N.Y.S.2d 1004(1979); People v. James, 98 Misc. 2d 755, 415 N.Y.S.2d 342, 343 (1979); Cf. People v. Bob Doe, N.Y.L.J., 4-6-79, page 12, col. 3(Rettinger,J.).

reduced charges in countless categories of crime but never in prostitution cases.[51]

Only in prostitution cases does the District Attorney have a uniform and unremitting policy of opposing all defense motions to dismiss first-offender cases in the interests of justice.[52] No matter how desperate were the circumstances which brought the offense into being, no matter how catastrophic are the predictable consequences of conviction to the first-offender, the District Attorney's unvarying position is that dismissal should be denied on account of prostitution's adverse

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51 People v. James, 98 Misc.2d 755, 415 N.Y.S.2d 342, 343 (1979); People Izsak (N.Y.), 99 Misc.2d 543, 552, 416 N.Y.S.2d 1004 (1979).

52 See N.Y.Crim. Proc. Law Section 170.40 (McKinney Supp. Pamphlet 1980); see note 50, supra.

impact upon the quality of life in New York County.[53]

The District Attorney thus shares with the community the disapprobation for those who mock and degrade sex by selling it commercially. Having shown the seriousness with which prostitution is regarded by the community and its designated officials, the District Attorney should not now say that such conduct is minor and that the attendant safeguard of trial by jury, before those accused can be convicted and branded, may be brushed aside.

IV.

[3,4] The Court finds that prostitution no matter how lightly punished, is a serious

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53 The District Attorney is reported to have observed that (prostitution) "has a serious negative impact on the quality of life in the City, and the economic viability of the City." Daily News, 3-28-79, page 18, as quoted in defendants' brief, page 9.

crime[54] and may not be prosecuted without the right to trial by jury. To the extent that C.P.L. Section 340.40 subd.(2)makes such trial unavailable in New York County, to wit, to these two defendants, that Section contravenes the Sixth and Fourteenth Amendments to the Federal Constitution and is null. In light of this resolution of the motion, it is unnecessary to reach and pass upon defendants' "equal protection"

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54 The "objective" factor (District of Columbia v. Clawans, 300 U.S. 617, 628, 57 S.Ct. 660, 663, 81 L.Ed. 843 [1937]) as reflected in "the existing laws and practices in the Nation" (Duncan v. Louisiana, 391 U.S. 145, 161, 88 S.Ct. 1444, 1453, 20 L.Ed. 491 [1968] is this: In at least twenty-five states, trial by jury is granted in prostitution cases. To arrive at this figure, I applied the six-month test of Baldwin v. New York, 390 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) to a chart containing the authorized sentences for prostitution convictions as reported in 1973 national survey. See Rosenbleet and Pariente, "The Prostitution of the Criminal Law," 11 Amer. Crim.L.Rev. 373, 422 6 (1973).

claim.[55]

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The District Attorney argues that "defendants have no fundamental right to a jury trial of the informations charging them with class B misdemeanors bearing maximum penalties of three months' imprisonment. Therefore, the appropriate standard of review as to the constitutionality of the classification created in CPL Section 340.40(2) is the 'rational nexus' test. Application of that test to CPL Section 340.40(2) reveals that it is reasonably related to a legitimate state interest in limiting the extreme congestion in the New York City Criminal Courts" (People's Answering Memorandum of Law, page 6). The District Attorney does not suggest that the alleged administrative inconvenience of granting trial by jury in prostitution cases could possibly justify denying such mode of trial where the Federal Constitution--and not merely a statute--confers the right to have such a trial. Therefore, as I do not reach the equal protection issue, left open in Baldwin v. New York, 399 U.S. 66, 71, note 17, 90 S.Ct. 1886, 1889, n.17 (1970) but later decided in conformity with the District Attorney's argument, in the lower court cases cited in note 46 F of this opinion, there is no occasion to resolve the claim of inconvenience. Suffice it that of 14,247 prostitution cases in Manhattan Criminal Court in 1979 (made up of 3,961 straight prostitution cases [N.Y.Penal Law Section 230.00 (McKinney 1980) and 10,286 loitering for prostitution cases [N.Y.Penal Law Section 240.37 (McKinney 1980)], a total of fifteen cases went to trial (eleven straight prostitution cases plus four loitering for prostitution cases). See note 57, infra. Research has failed to disclose any comparable hard data for cities such as Buffalo and Rochester where an accused prostitute may have a jury trial as of right; however, telephone interviews with officials

(fn. cont. on next page).

Motion granted. Trial by jury ordered.[56]

Order stayed thirty days to afford the District Attorney adequate time to pursue his legal options.[57]

(fn. cont. from preceding page)
in those cities yielded the impression that there had apparently been no prostitution jury trials in recent memory.

56
Gold v. Gartenstein (N.Y.), 100 Misc.2d 253, 418 N.Y.S. 2d 852 (1979); People v. Denning (N.Y.), 98 Misc.2d 369, 413 N.Y.S.2d 837 (1979); and Matter of Morgenthau (Nardelli), N.Y.L.J., 3-21-80, page 13, col. 3 are distinguishable from this case. They deal with CPL Section 340.40(7)--not with subdivision 2. Those opinions are based upon the premise that the very nature of youthful offender procedure makes the youthful offender adjudication "petty," e.g., no criminal record, as such, arises; the accusatory instrument is sealed; all court records are confidential; et cetera. See People v. Joseph M. (N.Y.), 84 Misc. 2d 1046, 1047, 377 N.Y.S.2d 440 (1975). Cf. Matter of Felder (N.Y.), 93 Misc.2d 369, 402 N.Y.S.2d 528 (1978).

57
Gratitude is expressed to Deputy Borough Chief Clerk of the Court, George Bessinger, for his arduous statistical compilation of 1979 prostitution cases referred to in note 55, supra; to Kathy Friedman, Ellen Goldstein and Jean Ray of the Law Department of the Court, for their extensive legal research; to New York Attorney Jonathan R. Goldberg, for his helpful suggestions pro bono publico; and to Assistant District Attorney Jane Sachs and defense counsel Kenneth R. Fields, for their excellent briefing of the issues.

No. 83-361

NOV 7 1983

IN THE

Supreme Court of the United States

October Term, 1983

WILLIAM M. ERLBAUM, a Judge of the Criminal Court of the City of New York, New York County,

Petitioner,

against

ROBERT M. MORGENTHAU, District Attorney of New York County,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

On June 7, 1983, the New York State Court of Appeals unanimously held that persons charged with prostitution in New York City may constitutionally be tried, as provided by Statute, by a judge rather than a jury, because those

defendants face a maximum of ninety days in jail under New York state law. *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983).

Petitioner William M. Erlbaum now seeks a writ of certiorari to review the judgment of the New York Court of Appeals.

Statement of the Case

On November 9, 1979, Carol Link and Debra Meltsner were arrested in a "leisure spa" known as the "Gramercy East," on complaints sworn to by two undercover New York City policemen. According to those complaints, each defendant had agreed to engage in a variety of sexual acts for a stated fee. The defendants were, therefore, charged with the class "B" misdemeanor of Prostitution, punishable under New York Penal Law Section 230.00 by no more than 90 days in jail.

Section 340.40(2) of the New York Criminal Procedure Law provides that New York City defendants charged with Class "B" misdemeanors shall be tried before a judge, not a jury. Nonetheless, although they faced far less than six months' imprisonment, the defendants moved for a jury trial, claiming that prostitution, by its nature, is a "serious" crime under the Sixth Amendment to the United States Constitution. On February 23, 1981, New York Criminal Court Judge William M. Erlbaum granted the motion for a jury trial. *People* v. *Link*, 107 Misc.2d 973 (N.Y. Crim. Ct. 1981).

In his opinion, the petitioner recognized that this Court's most recent cases had discussed a "fixed dividing line of

six months'' imprisonment between ''petty'' offenses and ''serious'' crimes. Nonetheless, the petitioner concluded that prostitution—''no matter how lightly punished''—is an ''inherently serious'' crime. Appendix at 66a-67a. Accordingly, the petitioner held that the Sixth and Fourteenth Amendments required a jury trial, and declared Section 340.40(2) of the New York Criminal Procedure Law unconstitutional. Appendix at 67a.

On April 17, 1981, Robert M. Morgenthau, District Attorney of New York County, brought an action in New York Supreme Court to review the petitioner's order. On November 10, 1981, Justice Francis N. Pecora concluded that prostitution was not a ''serious'' offense within the meaning of the Sixth Amendment, and therefore declared constitutional the New York statute requiring non-jury trials for charges of prostitution, which carries a maximum sentence of ninety days in jail. *Matter of Morgenthau* v. *Erlbaum*, 112 Misc.2d 30 (N.Y. Sup. Ct. 1981).

Petitioner Erlbaum appealed that judgment to the Appellate Division, First Department, of the New York Supreme Court. On September 16, 1982, that court unanimously affirmed the declaratory judgment, without opinion. *Matter of Morgenthau* v. *Erlbaum*, 89 A.D.2d 1062 (1st Dept. 1982). The petitioner then appealed to the New York Court of Appeals, again asserting that prostitution is so ''serious'' a crime that a jury trial is constitutionally mandated, notwithstanding that the maximum penalty is only ninety days in jail. On June 7, 1983, the Court of Appeals rejected that argument. *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983).

Writing for a unanimous court, Chief Judge Lawrence H. Cooke observed that this Court's recent decisions had

emphasized the "objective criterion" of the maximum sentence "to the exclusion of virtually everything else" in determining whether a crime is "serious" for Sixth Amendment purposes. Appendix at 21a. On the basis of this clear emphasis, the Court of Appeals concluded that this Court had adopted that "objective" dividing line. The Court of Appeals noted that the only alternative was a "subjective decision" by individual judges about the "history" and the "legal, moral, and psychological implications" of a particular crime. Appendix at 20a-21a. The Court of Appeals reasoned that this "subjective" evaluation was inadequate because it could vary "from county to county, town to town, or even court to court." Appendix at 23a. More importantly, the court concluded that, in determining the maximum penalty, the Legislature "must be presumed to have weighed public opinion and history" and all the other factors Judge Erlbaum had re-evaluated on his own. Appendix at 23a-24a. In other words, the maximum penalty itself is the "objective" reflection of the Legislature's —and the community's—judgment about the seriousness of the crime. Appendix at 22a-23a.

Reasons for Denying the Writ

1. The Court of Appeals of the State of New York concluded that this Court had adopted an objective and "fixed dividing line" between "serious" crimes that require a trial by jury and "petty" offenses which do not. Appendix at 22a. Contrary to the petitioner's assertion, that holding was based on the only fair reading of this Court's most recent decisions interpreting the Sixth Amendment right to a jury trial. For example, in its clearest discussion of the appropriate means for making this constitutional de-

termination, this Court concluded that "the severity of the penalty authorized . . . is the relevant criterion," because "the Legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank* v. *United States*, 395 U.S. 147, 149 (1969). Certainly, in determining whether a state crime is "serious" for constitutional purposes, this Court has focused exclusively on the maximum penalty carried by that crime. Indeed, this Court stated unambiguously in *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974), that:

> Our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes. *Id.* at 512.

Nor has this clear statement caused "substantial confusion" in the lower courts, as the petitioner now suggests. Petition for Certiorari at 38. Notably, the petitioner has pointed to no state court decision that has rejected this objective dividing line. On the other hand, as he concedes, five state courts, including the New York Court of Appeals, have concluded that the maximum penalty is the only relevant criterion for determining whether the Federal Constitution mandates a jury trial for a state crime.* Petition for Certiorari at 33-34. Indeed, the only case the petitioner has advanced that does apply other standards to a state crime is a federal district court decision that does not even mention, let alone analyze, this Court's decision in *Codispoti*.

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* *Matter of Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143 (1983); *City of Tampa* v. *Ippolito*, 360 So.2d 1316 (2d Dist. Fla. 1978); *State* v. *Young*, 194 Neb. 544, 234 N.W.2d 196 (Neb. 1975); *Commonwealth* v. *Mayberry*, 327 A.2d 86 (Pa.Sup.Ct. 1974); *State* v. *Owens*, 54 N.J. 153, 254 A.2d 97 (N.J.Sup.Ct. 1969), *cert. denied*, 396 U.S. 1021 (1970).

Brady v. *Blair*, 427 F.Supp. 5 (S.D.Ohio 1976). This single opinion hardly creates the kind of conflict which requires resolution by a grant of certiorari.*

Thus, contrary to the petitioner's suggestion, this Court's clear emphasis on the maximum penalty in its recent cases has been correctly analyzed and followed by virtually every court to apply the federal constitutional mandate to a state offense. There is no reason for this Court to grant certiorari simply to reaffirm its previous statements.

2. Even assuming that factors other than the maximum sentence should be considered in determining whether a jury trial is required, this case still would not warrant review. Even under the older theories used by this Court before the Sixth Amendment was applied to the states, prostitution simply cannot be deemed a "serious" offense. For example, one of the criteria most often cited in those older cases was whether a crime was indictable at common law. *Callan* v. *Wilson*, 127 U.S. 540, 555 (1888); *see also District of Columbia* v. *Clawans*, 300 U.S. 617 (1937); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930). As the petitioner has conceded, prostitution was not (Appendix at 53a, n.19).

The other factor most frequently mentioned by the early cases was whether the offense involves "moral turpitude." *See, e.g., District of Columbia* v. *Colts, supra.*

* Nor have the federal circuit courts imposed any other standards when reviewing the constitutionality of state statutes. Both the Sixth and Ninth Circuit cases on which the petitioner relies involved the appropriate standard to be applied in federal court to federal crimes. *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981); *United States* v. *Stewart*, 568 F.2d 501 (6th Cir. 1978); *United States* v. *Sanchez-Meza*, 547 F.2d 461 (9th Cir. 1976). *See also United States* v. *Woods*, 450 F.Supp. 1335 (D. Md. 1978).

Notably, the petitioner does not contend that prostitution involves "moral turpitude." Indeed, the courts in the District of Columbia, which, as federal courts, were bound to apply this analysis, have concluded that prostitution does not involve the kind of moral turpitude that gives rise to a right to a jury trial. *Bailey* v. *United States*, 98 F.2d 306 (D.C. Cir. 1938); *Marshall* v. *United States*, 302 A.2d 746 (D.C. 1973); *Austin* v. *United States*, 299 A.2d 545 (D.C. 1973).

Thus, even under these older theories, prostitution must be considered a "petty" offense. Certainly, New York State has always treated prostitution as a "petty" offense. From earliest colonial times, New York's laws provided that charges of prostitution should be tried to a judge, not to a jury, Frankfurter and Corcoran, *Petty Federal Offenses and Trial by Jury*, 39 Harv. L. Rev. 917, 944-945 (1926) ("Frankfurter and Corcoran"). After the Revolution, New York retained the colonial laws providing for bench trials in cases involving prostitution. Chapter 40 laws (1795); Frankfurter and Corcoran, 39 Harv. L. Rev. at 987. Under the predecessor to the present Penal Law, prostitution was simply a form of vagrancy, a "noncriminal" offense punishable by up to six months' imprisonment. New York Code Crim. Proc. §§ 887(4), 892.

True, as the petitioner notes, 43 states authorize a jury trial for this offense. However, this statistic hardly implies that prostitution is universally regarded as a "serious" crime. In fact, seventeen of those 43 states grant jury trial simply because, under state law, a jury trial is permitted for every offense, whether it is "serious" or not. The more significant statistic reveals that half of the states authorize

a penalty of below the constitutionally mandated dividing line of six months. Moreover, of the twenty-five other states, many impose sentences of more than six months only for recidivists. *See, e.g.* Michigan Comp. Laws Ann., §§ 750.448, 750.451; South Carolina Code, §§ 16-5-90, 16-15-110.

Plainly, then, there is no "uniform" national moral judgment about the seriousness of the crime of prostitution. Nonetheless, the petitioner attempted to impose "uniformity" by indulging in a "historical" analysis of his own. He remarked, for example, that prostitution was proscribed "in Biblical times" (Appendix at 55a, n.20). However, many of the other offenses deemed "petty" when the Constitution was adopted, like petty larceny, sabbath-breaking, and profanity were also proscribed in Deuteronomy.* Frankfurter and Corcoran, 39 Harv. L. Rev. at 983-988. Similarly, while it may be true, as the petitioner pointed out, that prostitutes are being stoned to death today in Teheran (Appendix at 55a, n.21)— so serious is this offense considered there—penal practices in the Republic of Iran hardly provide an appropriate gauge of New York's community standards.

The petitioner also suggested that accused prostitutes are entitled to a jury trial because, if convicted, they will be exposed to "the opprobrium of the 'fallen woman'" (Appendix at 55a-56a). Not a single case on which he relies supports a theory that social "opprobrium" or collateral social consequences of a conviction can trigger the constitu-

* *Compare* Deuteronomy, chapter 5, verse 19 "Thou shalt not steal." *with* 4 Colonial Laws of New York 969 (1768); Deuteronomy, chapter 5, verse 12 (observation of the sabbath) *and* Deuteronomy, chapter 5, verse 11 (swearing), *with* 1788 Laws Chapter 42 (Sabbath breaking, profanity).

tional right to a jury trial. In any event, his opinion once again illustrates the dangers of allowing a single judge to substitute his own view of the "seriousness" of the sociological and psychological impact of an offense for the Legislature's view. As noted by Justice Pecora, the first of twelve State judges to consider and reject the petitioner's theory, Erlbaum's conclusions about "society's perception" of prostitution are, at best, "highly debatable." *Matter of Morgenthau* v. *Erlbaum*, 112 Misc.2d at 35.

To support his side of the debate, the petitioner has culled epithets and negative comments about prostitutes from a variety of sources (Appendix at 55a-56a). However, if some judges once considered prostitutes "malodorous and evil characters" (Appendix at 58a), many judges today clearly do not. If "great masses of people" believe that prostitution leads to other forms of criminal conduct (Appendix at 58a), many other people surely do not. For example, the American Civil Liberties Union—of counsel to the petitioner—has for years argued that prostitution should be decriminalized altogether. *See* AMERICAN CIVIL LIBERTIES UNION, STATEMENTS OF POLICY, No. 210 (undated but referring to Board Minutes of September 27-28, 1975, April 10-11, 1976, and March 5-6, 1977). Thus, the conclusion that negative public opinion about prostitutes is universal is, at best, outdated.

Accordingly, even if other factors were relevant to determine whether a crime is "serious" for this constitutional purpose, there is no need to grant review here because prostitution does not satisfy any of the relevant criteria.

• • •

In sum, this Court has established a fixed dividing line, based on the maximum authorized penalty, between "serious" crimes, which require trial by jury, and "petty" offenses, which do not. There is neither reason nor need to grant certiorari to reaffirm this already clear rule.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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